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No. 1114

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

GENERAL ELECTRIC COMPANY, *Petitioner,*

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO, *Respondent.*

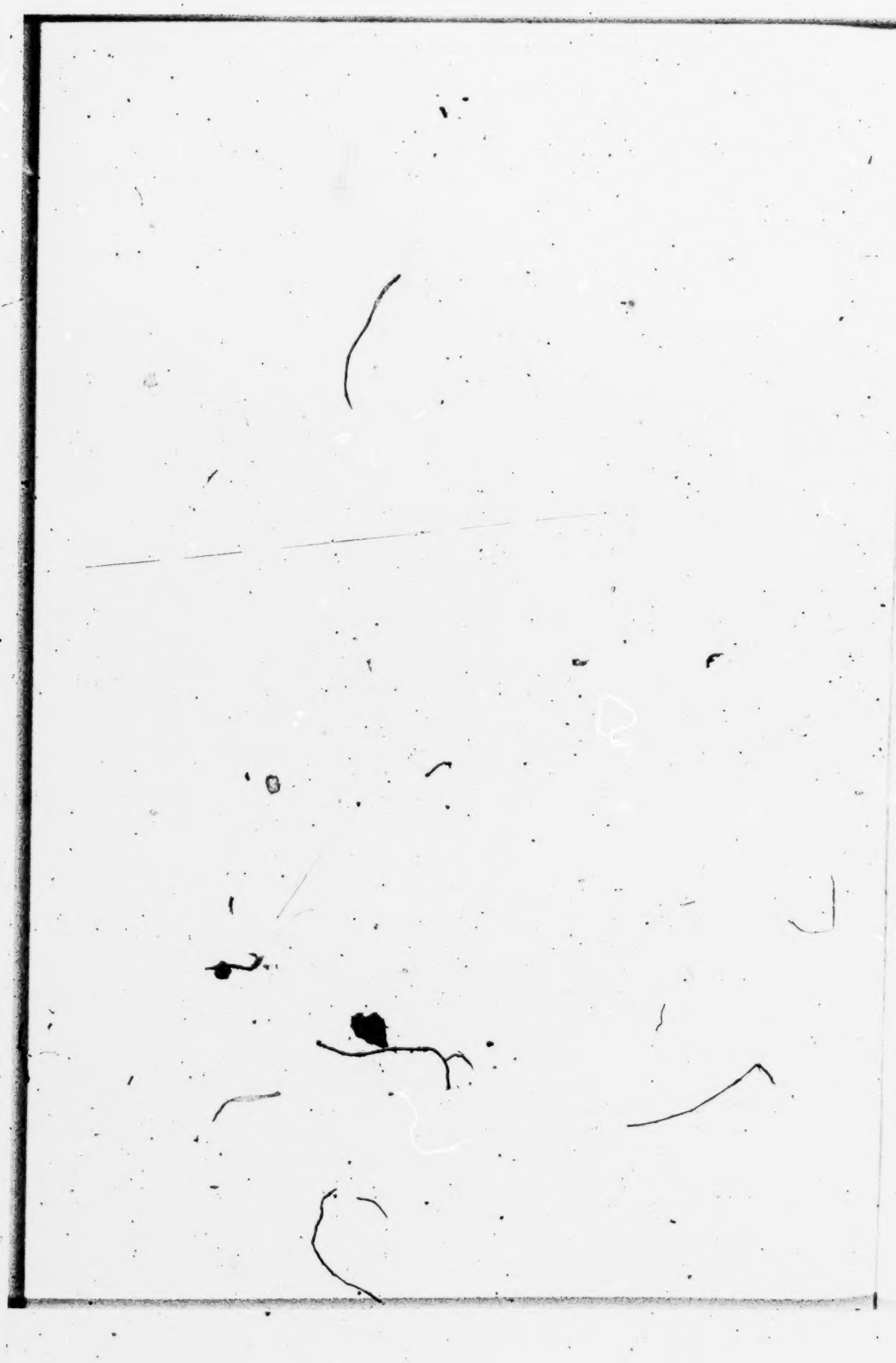
On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court, Southern District of New York, Weinfeld, J., printed in Appendix to Petition (pp. c-w), is reported in 278 F. Supp. 991. The opinion of the court of appeals, printed in the petition, Appendix A (pp. 27-53) is not

yet officially reported but is unofficially reported in 70 LRRM 2082, and, in regard to all issues raised by the petition, affirmed the district court.

QUESTIONS PRESENTED

1. Whether the court below properly construed the guidelines of arbitrability set forth in a collective bargaining agreement when it affirmed an order of the district court directing arbitration.

2. Whether the administrative determination by a regional director of the National Labor Relations Board not to issue a complaint with respect to alleged violations of Section 8(a)(1), (3) and (5) of the National Labor Relations Act, 61 Stat. 140, 29 U.S.C. 158(a)(1), (3) and (5), because of insufficient evidence of such violations, acts as a collateral estoppel of a claim for arbitration based upon the contention that the same factual situation also gave rise to violations of the provisions of a collective labor agreement, which establish contractual obligations differing in character from the statutory obligations.

STATEMENT

The respondent herein, International Union of Electrical, Radio and Machine Workers, AFL-CIO (hereinafter referred to as "Union"), brought a suit under Section 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. 185, in the United States District Court for the Southern District of New York to compel the petitioner herein, General Electric Company (hereinafter referred to as "Company"), to arbitrate certain grievances which had arisen under applicable National Agreements between the Union and the Company. The district court, by its judgment of

February 19, 1967, ordered arbitration of all of the grievances. The Company thereafter appealed to the United States Court of Appeals for the Second Circuit from the judgment of the district court. On December 27, 1968, the court of appeals entered judgment (Appendix to Petition, pp. a-b), affirming the district court as to four grievances, three [1] of which arose under the 1963 National Agreement between the parties and are the subject matter of the petition herein, and reversing the district court as to the remaining three grievances.[2] The Company has not sought review of the fourth grievance, National Docket No. 7309, on which arbitration was ordered by the district court and affirmed by the court of appeals.

A. The 1963 National Agreement

Article XV, Sections 1 and 6(a) of the 1963 National Agreement clearly and unambiguously provide that "any" grievance which remains unsettled after having been fully processed through the contractually-prescribed grievance procedure and which involves the interpretation or application of a provision of the Agreement or a disciplinary penalty or the claimed violation of the provisions of a signed Local Seniority Supplement is arbitrable as a matter of right (Pet., pp. 56, 61-62).

The language of Article XV, Section 1 of the 1963 National Agreement is, in all respects here material,

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[1] National Docket Nos. 9280, 9349 and 8759. The "National Docket Number" is the parties' designation at the third step of the contractually-established grievance procedure, identifying a grievance.

[2] National Dockets Nos. 8290, 8427, and 8643 are the subjects of the Union's conditional cross-petition for a writ of certiorari heretofore filed in No. 1208, this Term.

the same as appeared in that section in previous National Agreements between the parties (compare A. 75-76 [3] with Pet., p. 56). Article XV, Section 1 has been previously construed by the court below and found to constitute the broad and comprehensive standard labor arbitration clause to which the principles enunciated in the *Steelworkers* trilogy of cases [4] apply. *International Union of Electrical, Radio and Machine Workers* v. *General Electric Co.*, 332 F.2d 485, 488 (2d Cir. 1964), cert. denied, 379 U.S. 928 (1964); *Carey* v. *General Electric Co.*, 315 F.2d 499, 505 (2d Cir. 1963), cert. denied, 377 U.S. 908 (1964).

Other sections of Article XV of the 1963 National Agreement represent a change from the prior agreements in that they contain an expanded version of the exclusionary language found in earlier National Agreements between the parties. Thus, Article XV, Section 7 of the 1963 National Agreement (Pet., pp. 62-65) lists various exclusions from arbitration, except where the Company consents to arbitration. Relevant to the consideration of National Docket Nos. 9280 and 9349 is Article XV, Section 7(e) (Pet., p. 63), which excludes from arbitration, except upon the Company's consent, those arbitration requests which would require an arbitrator to consider, rule on or decide the appropriate hourly, salary or incentive rate at which an employee shall be paid. The intent of this exclusionary and limiting language is explained in a footnote to

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[3] "A" refers to "Appellant's Appendix", as filed in the court of appeals, copies of which have been supplied to this Court.

[4] *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Article XV, Section 7, Subsections (e), (f) and (g)[5] which states that "Subsections (e), (f) and (g) above reflect the fact that this National Agreement does not set out specific rates or classifications for jobs, and are designed to confirm the intent of *Article VI, Section 1 and Article VI, Section 5 (first sentence)* that disputes over *individual* job classifications, rates of pay, incentive standards, etc., are assigned by the parties to local negotiations, and not to arbitration" (Pet., pp. 63-64) (Emphasis supplied).

Disciplinary penalties (including discharge), are arbitrable as of right (Article XV, Sections 1(b) and 6(a)(i), Pet., pp. 56, 61). The contractual standard to be applied by an arbitrator in a discharge case is just cause (Pet., p. 56).[6]

B. The Three Grievances

National Docket Nos. 9280 and 9349 involve direct violations of Article VI, Section 4 of the National Agreement. In National Docket No. 9280, the Union protested a direct violation of Article VI, 4(b) by the Company when it changed the standard price with respect to a power transformer cover welding operation without a corresponding change in manufacturing method (A. 32, 52-53). Similarly, in National Docket No. 9349, the Union protested a change in the standard

[5] Article XV, Section 7 (f) and (g) would remove from the arbitrator's purview elements of an employee's job assignment: the level, title or other designation of an employee's job classification; the right of management to assign or reassign work or elements of work; and the determination of the method or data to be used by the Company in setting an incentive price or standard (Pet., pp. 63-64).

[6] See also Article XV, 1 (a) (Pet., p. 59).

price with respect to Layout Tack Weld—Weld Bases without a corresponding change in manufacturing method (A. 33, 53-54).

Article VI, Section 4(a) defines the terms "standard piece price", "special piece price", and "temporary piece price" (Pet., p. 55). Article VI, Section 4(b) then imposes a contractual restraint upon any change in standard piece prices by stating that there will be no change in a standard price except where there is a change in manufacturing method (Pet., p. 55). Thus, the two grievances, involving a direct violation of Article VI, Section 4(b), are clearly arbitrable under the guidelines established by Article XV of the National Agreement.

National Docket No. 8759 involved the discharge of fifteen welders, at the Company's Trenton, New Jersey plant, who had engaged in a work stoppage (A. 31). These welders had certain grievances which had been processed through the three steps of the grievance procedure and remained unresolved (A. 48-49). Under Article XIV, 1 of the National Agreement, employees have a right to strike over a grievance which has been processed through the three steps of the grievance procedure and remains unresolved. The employees exercised this right to strike and subsequently were discharged (A. 31, 48-49). The Local Union, while pursuing the matter of discharge under the grievance provisions of the National Agreement, also filed unfair labor practice charges with the National Labor Labor Relations Board, Region 22, alleging violations of Section 8(a)(1), (3) and (5) of the National Labor Relations Act, 61 Stat. 140, 29 U.S.C. 158(a)(1), (3), (5). The regional director refused to issue a complaint on the claimed *statutory* violation and this

refusal to issue a complaint was sustained by the General Counsel by a letter which in pertinent part stated as follows (A. 49):

> "This office sustains the ruling of the Regional Director. It was concluded that * * * *insufficient basis* existed for finding that the welders were engaged in other than an economic strike * * *" (Emphasis supplied).

C. The Decisions Below

Both the district court and the court of appeals agreed that the grievances here involved were made arbitrable by specific provisions of the agreement between the parties and were not within any of the excluded categories (A. 15-18, 20, Pet., pp. 40-48). With respect to the contention that National Docket No. 8759 was barred by the regional director's refusal to issue an unfair labor practice complaint, both the district court and the court of appeals held that the regional director's action was not a bar because of the difference between the issues presented by a statutory violation as contrasted with a contractual violation and because the refusal to issue a complaint is not an adjudicative adversary proceeding (A. 19-20, Pet., p. 47).

ARGUMENT

I.

The Court Below Followed Established Principles of Contract Interpretation, the Correctness of the Application of Which Raises No Issue Warranting Review by This Court.

This litigation turns on the construction of a National Agreement between the parties and particularly the arbitration clause thereof (Article XV) (Pet., pp. 56-65). This National Agreement has been characterized by the court below as an "unusual contract" (Pet.,

p. 37), and as containing "unusually complex contractual language" (Pet., p. 28). No question of national importance exists requiring the granting of a writ of certiorari, where the review sought is of a lower court decision turning solely on the construction of a particular contract, or special facts peculiar to the case, the settlement of which is of importance to the litigants involved rather than the public. *Rudolph* v. *United States,* 370 U.S. 269, 270 (1962); *Rice* v. *Sioux City Cemetery,* 349 U.S. 70, 79 (1955); *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U.S. 387, 393 (1923).

The Company has attempted to avoid this bar to the grant of a writ in this case by its formulation of the first question presented in its petition (Pet., pp. 2-3). The question as formulated by the Company is whether the court below was obliged by command of Federal policy as enunciated in the *Steelworkers* trilogy of cases to disregard the standards for arbitrability of grievances specifically adopted by the parties in the National Agreement. This formulation is patently erroneous since the court below did not disregard the guidelines for arbitrability of grievances found in the National Agreement, but, in holding the three subject grievances arbitrable, gave full effect to the specific guidelines in the National Agreement, rather than to any general presumption arising from, or established by, the *Steelworkers* trilogy (Pet., p. 37). Thus, the court below explicitly stated (Pet., p. 37):

> "We think * * * a command to ignore a presumption of arbitrability would have to be much more specific to be effective. *In any event * * * we need not decide the effect of this part of the 1963 Agreement because we do not rely on any general pre-*

sumption in deciding the arbitrability of the particular grievances at issue.

"Finally, we recognize that *our role is* still not to appraise the merits but *to determine whether the Agreement's more rigorous test of prima facie arbitrability is met.*" (Emphasis supplied).

The court below not only negatived reliance upon any presumption of arbitrability but stated affirmatively that it would first ascertain whether the grievances involved a claimed violation of a specific provision of the collective bargaining agreement and then determine whether any other provision of the agreement excluded the grievances from arbitrability (Pet., pp. 37-38). The court's discussion of the arbitrability of the grievances here involved shows that the court below applied these two criteria in deciding the case (Pet., pp. 40-48). In basing its holdings with respect to the subject grievances upon the arbitrability standards established in the National Agreement, the court below has given full force and effect to the very arbitrability standards which the petitioner claims the court disregarded.

In the course of its opinion, the court below commented that "there is a substantial question whether national labor policy may be so blithely diluted" (Pet., p. 36), as the Company urged in arguing that the *Steelworkers'* principles should be completely disregarded in considering the subject grievances. The court below did not answer this question as it was unnecessary in view of the issues presented. This expression by the court of a doubt, not material to the actual decision, presents nothing reviewable by this Court. See *Stickel* v. *United States*, 76 S. Ct. 1067, 1068, 1 Ed. 2d 30, 31 (1956).

II.

The Decision of the Court Below Interpreting the Contract as Providing for Arbitration of the Subject Grievances Is Clearly Correct.

The Company's basic argument is that the court below misinterpreted the contract because Article XV of the 1963 National Agreement negated any presumption of arbitrability (Pet., p. 5) raised by the *Steelworkers* trilogy. But, as the language we quoted above from the opinion of the court below shows, the court expressly disclaimed reliance "on any general presumption in deciding the arbitrability of the particular grievances at issue" (Pet., p. 37). The court's analysis of each grievance, first, in terms of whether it was within the language of the contract providing for arbitrability and, then, whether it was within any exclusion (Pet., pp. 40-48), shows the court did not rely on any presumption of arbitrability but rather decided the case in accord with traditional principles of contract interpretation.

Nor is the petitioner correct in its assumption that the agreement negatived any presumption of arbitrability. To support its argument, the Company cites a number of articles written by commentators in the field of labor law (Pet., pp. 4, 7). However, not one of the articles cited states either explicitly or implicitly that Article XV was actually a negation or reversal of the presumption of arbitrability raised by the *Steelworkers* trilogy. Moreover, the quotation from the speech of the Union's then General Counsel (Pet., p. 4, 6) indicates that the Company made "a very conscious effort to nullify the trilogy" (*ibid.*) but this intention of the Company cannot be read as the mutual intention of

the parties unless such mutual intention is clearly and unambiguously stated in the National Agreement.[7]

An analysis of Article XV reveals that rather than being a negation or reversal of the *Steelworkers'* doctrine, the arbitration clause is consistent with the language of, and may be subsumed, under such doctrine. The language of Article XV, Sections 1 and 6(a) (Pet., pp. 56, 61-62) encompasses the broad and comprehensive standard labor arbitration clause to which the *Steelworkers'* doctrine applies. *Any grievances* involving the interpretation or application of a specific provision of the National Agreement or of a signed Local Seniority Supplement or *any* grievances involving disciplinary action, including discharge, is arbitrable as of right (Pet., p. 61). The exclusions from and restrictions on arbitrability are primarily contained in Article XV, Section 7 (Pet., pp. 62-65). Article XV, Section 7 commences with the following specific language (Pet., pp. 62-63):

> "All requests for arbitration *which are not subject to arbitration* as a matter of right under the *provisions of Section 6* above, are subject only to voluntary arbitration."

Thereafter, Article XV, Section 7 specifies the limitations on or exclusions from arbitration, except if the Company consents to arbitrate (Article XV, 7(a)-(1),

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[7] The Company in effect conceded this in the court below when it argued orally and in its brief that the reversal of the presumption of arbitrability was "expressly declared" in the 1963 National Agreement.

Pet., pp. 63-65).[8] Although various contractual provisions are specifically excluded, such as, Article VI, Section 1 and Article VI, Section 5 (first sentence), Article VI, Section 4 is not excluded. Thus, the grievances bearing National Docket Nos. 9280 and 9349, involving the interpretation and application of Article VI, Section 4, are clearly arbitrable and the court below, in holding such grievances arbitrable, was plainly correct.

III.

There Is No Question Warranting Review in the Holding of the Court Below That a Regional Director's Refusal to Issue an Unfair Labor Practice Complaint Is Not a Final and Binding Determination as to the Arbitrability of a Grievance Alleging a Contractual Violation.

In requesting review of the decision of the court below as to National Docket No. 8759, the Company has attempted to elevate a regional director's refusal to issue a formal complaint on an alleged violation of the National Labor Relation's Act, as amended, to the status of a final and binding determination as to a grievance alleging a contractual violation: namely, the discharge without just cause of fifteen welders. This attempt is as lacking in merit as the cases cited by the

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[8] In connection with the Company's statement that leading authorities regard Article XV as "perhaps the most elaborate and tightly drawn . . . restrictions on the arbitration process" (Pet., p. 4) (Emphasis supplied), it is interesting to note the observations of one judge who had the task of construing an almost indentical arbitration clause: "Thus, we have in this collective bargaining agreement an arbitration section * * * containing broad arbitration provisions in Paragraphs 1 and 6 which deal respectively with general arbitrability and arbitration as of right. These *broad* provisions are hedged about with a variety of restrictive provisions, some *general*, some *specific, and many obscure and confusing.*" *Jennings* v. *Westinghouse Electric Corp.*, 283 F. Supp. 308, 313-314 (S.D.N.Y. 1968).

Company to support its position are inapposite. As one leading authority in the field of administrative law has stated:

> "*Some administrative determinations are clearly without res judicata effect in any circumstances*—a zoning board after hearing amends a regulation, a utilities commission prescribes a maximum rate, the CAB decides which of two airlines should provide a particular service, *or the NLRB refuses to issue a complaint on a particular charge*"[9] (Emphasis supplied).

The legal issues before the regional director and an arbitrator are different, with different standards being applied in each forum. *United Steelworkers* v. *American Int'l Aluminum Corp.*, 334 F.2d 147, 152-153 (5th Cir. 1964), cert. denied, 379 U.S. 991 (1965). The regional director is concerned with the statutory rights of employees not to be discharged because of their union membership or because of anti-union discriminatory purposes on the part of the Company, while in an arbitration proceeding, the Union seeks to enforce the contractual right of employees not to be discharged unjustly. *Ibid.* To the same effect, *Fibreboard Paper* v. *East Bay Union of Machinists*, 344 F.2d 300, 304 (9th Cir. 1965), cert. denied, 382 U.S. 286 (1965).

Aside from this basic, and controlling, difference, the *very nature* of the regional director's investigation of a charge prior to the issuance or the refusal to issue a

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[9] Davis, 2 Administrative Law Treatises § 18.03, p. 559 (West Publishing Company, 1958). Professor Davis had previously described collateral estoppel as being of more limited effect and application than *res judicata* (id., at p. 558). Obviously, his discussion with respect to the *res judicata* effect of a refusal to issue a complaint in an NLRB proceeding then applies with at least equal force to collateral estoppel.

formal complaint, is explicitly an informal, non-adversarial proceeding.

Thus, Section 102.15 of the sub-part B of the National Labor Relations Board Rules and Regulations, 29 CFR 102.15, states that only if it appears to the regional director that *formal* proceedings in respect to an unfair labor practice charge which has been filed should be instituted, then he shall issue a formal complaint.

The administrative investigation which the regional director undertakes prior to the commencement of formal proceedings does not involve a trial, a confrontation of witnesses, cross-examination or the recourse to the courts by reason of the regional director's failure to issue a complaint. There is no litigation of the charge. Yet it is this admittedly informal determination which the Company now wants this Court to give the effect of a collateral estoppel as far as arbitrability of a grievance concerning a contractual violation.[10]

The cases which the Company has cited to support its position, on close analysis, are seen to be inapposite.

Thus, *Valley Die Cast Corp.*, 130 NLRB 508 (1961), enforced, 303 F.2d 64 (6th Cir. 1962) and *Cincinnati Cordage and Paper Co.*, 141 NLRB 72 (1963) are cited for the proposition that permanent replacement of economic strikers refusing to return to their posi-

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[10] In its answer to the amended complaint herein, the Company stated that the question involved in National Docket No. 8759 "was resolved on its merits, in defendant's favor by a final and binding determination in a proceeding between the parties hereto before the National Labor Relations Board on or about August 4, 1964" and that by "virtue of the foregoing no arbitrator has jurisdiction to determine this question and no court has jurisdiction to compel arbitration therefore." (A. 35) (Emphasis supplied.)

tions does not constitute a discharge. However, the issue of "economic strike" in these two cases was decided *after* a plenary trial where both the Board's General Counsel and the employer had an opportunity to present evidence, to confront and cross-examine witnesses. This is admittedly not the case in this proceeding. (Pet., p. 21).

Similarly, the cases cited on page 22 of the petition herein[11] are inapposite. These cases deal with the authority and discretion of the Board's General Counsel as to Board matters, and not with the finality of such exercise of authority upon an entirely different proceeding involving no statutory violation.

Kentile, Inc. v. *Local 457,* 228 F. Supp. 541 (E.D.N.Y. 1964) involved a motion to stay arbitration *after* a Trial Examiner had decided an unfair labor practice charge against a union, but before the Board had acted on the Trial Examiner's intermediate report.[12] In the *Kentile* case, a violation of the National Labor Relations Act had been found, and for this reason arbitration was stayed. This has no application here. The Company here attempts to equate a stay pending Board determination of a Trial Examiner's decision after a formal trial as, in *Kentile,* with a complete bar to arbitration on a regional director's administrative investigation without any trial.

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[11] *Local 282* v. *NLRB,* 339 F. 2d 795 (2d Cir. 1964); *McLeod* v. *Local 239,* 330 F. 2d 108 (2d Cir. 1964); *Electrical Contractors Assn.* v. *Ordman,* 258 F. Supp. 762 (S.D.N.Y. 1965).

[12] The Court in the *Kentile Case* stated at 544: "Here, however, we have the converse situation, an action to stay arbitration pending the decision of the Board on a charge filed by the employer, involving the very question to be arbitrated, and *in which there had been a preliminary finding against the Union by the Board's Examiner.*" (Emphasis the Court's.)

The Company further cites two state court cases, *Matter of Buschholz,* 15 N.Y. 2d 191 (1965) and *Bluebird Knitwear Co.* v. *Livingston,* 54 LRRM 2476 (1963). Again, the precedents are misleading. Cases arising under Section 301 are to be governed by federal substantive law which the Federal Courts must fashion from the policy of the national labor laws, *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, 456 (1957), and a state court's action, involving no question of national labor law, is not pertinent, and will not govern, *Id.,* at 457.

The court below cited and followed (Pet., p. 47), the cases of *United Steelworkers* v. *American Int'l Aluminum Corp.,* 334 F.2d 147 (5th Cir. 1964) cert. denied 379 U.S. 991 (1965) and *Fibreboard Paper* v. *East Bay Union of Machinists,* 344 U.S. F.2d 300 (9th Cir. 1965), cert. denied, 382 U.S. 826 (1965), arising in different circuits, and reaching the same result as the court below. To the same effect see *Glass Bottle Blower Assn.* v. *Arkansas Glass Container Corp.,* 183 F. Supp. 829 (E.D. Ark. 1960) There is no conflict in the circuits with respect to the issue involved in National Docket No. 8759.

The Company has apparently recognized this by attempting to extend the dictum in *Smith* v. *Evening News,* 371 U.S. 195, 197-198 (1962) in order to raise a "serious" problem which would support this Court's grant of certiorari (Pet., p. 19). However, an examination of the language in the *Smith* case (*ibid.*) shows that this Court expressed doubts as to whether "serious" problems would arise:

> "The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but

it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301. If, as respondent strongly urges, there are situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice, we shall face those cases when they arise." *Ibid.* (Emphasis supplied.)

It is respectfully submitted that the Company's attempt to convert a regional director's refusal to issue a complaint because of insufficient evidence to show a statutory violation[13] into a final and binding determination by the *Board* with respect to a grievance alleging a contractual violation, in light of the well-settled principles of administrative law to the contrary, does not raise a serious problem of concurrent jurisdiction or an important question of Federal law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

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April 2, 1969

[13] The Board's General Counsel in sustaining the Regional Director specifically stated: "This office affirms the ruling of the Regional Director. It was concluded that * * * insufficient basis existed for a finding that the welders were engaged in other than an economic strike * * *" (A. 49) (Emphasis suppplied).